Public Prosecutor v Ling Leong Kong

HIGH COURT (KUALA LUMPUR) — CRIMINAL REVISION NO 43–8 OF 2008
MOHAMED APANDI ALI J
24 JULY 2008

Criminal Procedure — Acquittal or discharge — Discharge of accused not amounting to acquittal — Complainant had returned to Japan for further medical treatment — Prosecution requested case to proceed by calling witnesses and complainant — Whether examining witnesses in absence of complainant an exercise in futility — Whether discharge not amounting to an acquittal valid — Criminal Procedure Code s 173(g)

This was an appeal against the order, on a revision, to set aside the sessions court judge's order of discharge not amounting to an acquittal ('DNAA') given under s 173(g) of the Criminal Procedure Code ('CPC'). In this case, the appellant was facing a charge under s 409 of the Penal Code and the DNAA order was given before the commencement of the trial. The case had been postponed on several occasions and including the fact that the complainant was hospitalised and that she had gone back to Japan for further medical treatment. The prosecution had, in no uncertain terms, requested for the case to proceed by calling the witnesses to testify first and thereafter, to call the complainant. The learned trial judge however, declined the request and granted the DNAA order on the ground that it would be an exercise in futility to examine witnesses in the absence of the complainant. Further, the DPP had conceded that the whereabouts of the complainant was not known. The revision came about pursuant to a letter dated 8 May 2008 by the DPP that was addressed to this court's attention. Acting on the letter, the records of the proceedings of the sessions court was called up so as to examine the correctness, legality and propriety of the order made.

Held, allowing the appeal:

(1) Before the court could invoke s 173(g) of the CPC, the court must at least allow the prosecution to proceed with its case so that the court could evaluate the evidence and its circumstances it to consider and conclude that the charge to be groundless (see para 8).

(2) From the records, there was clear indication that the prosecution desired to call the other available witnesses first, in order to proceed

with its case. However, the prosecution was not given the opportunity to proceed with its case. It had not proceeded to the initial stage of the case; not even the calling of the first prosecution witness. Without hearing even a portion of the prosecution's case the trial judge would not be able to consider and conclude that the charge was groundless as it would tantamount to stepping into the shoes of the public prosecutor (see paras 9–10).

(3) On the issue of the complainant in the case being absent, it is noted that from the records, the complainant was not available because she was hospitalised and subsequently she went back to Japan for further medical treatment. These are valid reasons and it is unjustified for the trial judge to conclude that the complainant was not interested in coming to the court. And even if, after the calling of other witnesses for the prosecution, she is still unavailable, the prosecution still have the option to tender her statement to the police, as part of the prosecution's case under the provisions of s 32(1)(i) of the Evidence Act 1950 (see para 11).

(4) For the trial judge to conclude that to allow the prosecution to proceed with its case, in the circumstances, to be an exercise in futility was premature and inappropriate. The court could not and should not pre-empt the manner the prosecution intended to proceed with its case. In the light of the above, the court, in the administration of criminal justice, must weigh the balance of justice when it comes to a situation between the interest of the accused versus the interest of the prosecution which represent the public and the state (see paras 11 & 21).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap perintah, atas satu semakan, bagi mengenepikan perintah hakim mahkamah sesyen berkenaan dilepas tanpa dibebaskan yang diberikan di bawah s 173(g) Kanun Prosedur Jenayah ('KPJ'). Dalam kes ini, perayu menghadapi pertuduhan di bawah s 409 Kanun Keseksaan dan perintah dilepas tanpa dibebaskan telah diberikan sebelum bermulanya perbicaraan. Kes telah ditangguhkan beberapa kali dan termasuklah mengambilkira fakta bahawa pengadu telah dimasukkan ke dalam hospital serta dan beliau telah kembali ke Jepun untuk mendapatkan rawatan perubatan susulan. Pendakwaan, dalam keadaan kurang pasti, meminta kes diteruskan dengan memanggil saksi-saksi untuk memberikan keterangan dahulu dan kemudiannya, memanggil pengadu. Walau bagaimanapun, hakim bicara yang terpelajar, telah menolak permintaan dan memberikan perintah dilepas tanpa dibebaskan atas alasan bahawa ia adalah amalan yang sia-sia untuk memeriksa saksi-saksi berikutan ketiadaan pengadu. Selanjutnya, timbalan pendakwaraya mengaku bahawa

lokasi pengadu tidak diketahui. Semakan semula dibuat berdasarkan kepada surat bertarikh 8 Mei 2008 oleh timbalan pendakwaraya yang dihantar untuk perhatian mahkamah ini. Bertindak atas surat tersebut, rekod-rekod prosiding mahkamah sesyen telah dipanggil bagi memeriksa ketepatan, kesahan dan kesesuaian perintah yang telah dibuat.

Diputuskan, membenarkan rayuan perayu:

(1) Sebelum mahkamah boleh menggunapakai s 173(g) KPJ, mahkamah hendaklah sekurang-kurangnya membenarkan pendakwaan meneruskan kesnya supaya mahkamah boleh menilai keterangan dan keadaan-keadaannya bagi mempertimbangkan dan membuat kesimpulan bahawa pertuduhan adalah tidak berasas (lihat perenggan 8).

(2) Daripada rekod-rekod, terdapat petunjuk yang jelas bahawa pendakwaan berhasrat memanggil dahulu sakis-saksi yang ada, bagi meneruskan kesnya. Walau bagaimanapun, pendakwaan tidak diberikan peluang untuk meneruskan kesnya. Ia tidak diteruskan dari peringkat awal kes; tidak juga memanggil saksi pertama pendakwaan. Tanpa mendengar sedikit pun kes pendakwaan hakim bicara tidak berdaya untuk mempertimbangkan dan membuat kesimpulan bahawa pertuduhan adalah tidak berasas kerana ia sama seperti beliau bertindak sebagai pendakwaraya (lihat perenggan 9–10).

(3) Berkenaan isu pengadu dalam kes ini yang tidak hadir, berdasarkan rekod-rekod, pengadu tidak dapat hadir kerana beliau telah dimasukkan ke dalam hospital dan kemudiannya kembali ke Jepun untuk rawatan perubatan susulan. Ini merupakan alasan yang kukuh dan ia tidak berasas bagi hakim bicara membuat kesimpulan bahawa pengadu tidak berminat untuk hadir ke mahkamah. Dan walaupun sekiranya, selepas memanggil saksi-saksi pendakwaan yang lain, beliau masih tidak hadir, pendakwaan masih mempunyai pilihan untuk mengemukakan kenyataanya kepada polis, sebagai sebahagian daripada kes pendakwaan di bawah peruntukan s 32(1)(i) Akta Keterangan 1950. (lihat perenggan 11).

(4) Bagi hakim bicara membuat kesimpulan membenarkan pendakwaan meneruskan kesnya, dalan keadaan-keadaan ini, ia akan menjadi amalan yang sia-sia adalah pramatang dan tidak wajar. Mahkamah tidak boleh dan tidak sepatutnya menggagalkan cara yang dikehendaki oleh pendakwaan untuk meneruskan kesnya. Berdasarkan kepada perkara di atas, mahkamah, dalam pentadbiran keadilan jenayah, hendaklah menimbang imbangan keadilan apabila berhadapan dengan situasi

A antara kepentingan tertuduh dan kepentingan pendakwaan yang mewakili orang awam dan juga negara (lihat perenggan 11 & 21).]

Notes

For cases on discharge of accused not amounting to acquittal, see 5(1) B *Mallal's Digest* (4th Ed, 2007 Reissue) paras 104–111.

Cases referred to

Chu Chee Peng v PP [1973] 2 MLJ 35 (refd)
Karpal Singh v PP [1991] 2 MLJ 244 (refd)
C *PP v Au Seh Chun* [1998] 6 MLJ 179 (refd)
PP v Hettiarachigae LS Perera [1977] 1 MLJ 12 (refd)
PP v Karumah [1980] 2 MLJ 102 (refd)
PP v Mat Radi [1982] 1 MLJ 221 (refd)
D *PP v Tan Kim San* [1980] 2 MLJ 98 (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100 (refd)
R v Humphries [1997] AC 1 (refd)

Legislation referred to

E Criminal Procedure Code s 173(f), 173(g), 254, 323, 325, 325(1)
Evidence Act 1950 s 32(1)(i)
Penal Code s 409

Ahmad Bache (Hafiz Yusoff, with him) (Deputy Public Prosecutor, Attorney F *General's Chambers) for the appellant.*
Amrit Pal Singh (Amrit & Co) for the respondent.

Mohamed Apandi Ali J:

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[1] This is an appeal against the order, on a revision, to set-aside the session court judge's order of discharge not amounting to an acquittal ('DNAA') given under s 173(g) of the Criminal Procedure Code ('CPC'). The accused was facing a charge under s 409 of the Penal Code and the DNAA order was H given before the commencement of the trial.

[2] The revision came about pursuant to a letter dated 8 May 2008 by the learned deputy public prosecutor that was addressed for my attention. Acting on that letter, I then called for the records of the proceeding of the case, ie, I Session Court Case No 1–62–620 of 2004, to examine the correctness, legality and propriety of the order made. In exercise of my powers under ss 323 and 325 of the CPC, I then called the case for revision and the case was then fixed for hearing on 27 June 2008. At the hearing all the parties were present and represented and they were heard.

[3] Armed with the record of proceedings of the court below, the court proceeded to hear submissions from both parties.

CHRONOLOGY OF PROCEEDINGS

[4] From the record of proceedings, the chronology of proceedings leading to the DNAA order are as follows:

(1) On 10 December 2004, the accused was charged in court and was released on bail;

(2) On 17 January 2005, the case was mentioned to fix a hearing date;

(3) On 26 September 2005, was the first hearing date, but the case could not proceed as the DPP attended a course;

(4) On 9 October 2005 was the second hearing date, where the case was postponed because the complainant was hospitalised, and a medical certificate was tendered.

(5) On 23 April 2006 was the third hearing date, but for reasons not recorded, the case was postponed;

(6) On 1 October 2007 was the fourth hearing date, where the case was postponed because complainant went back to Japan for medical treatment;

(7) On 5 November 2007 was a mention date, to await, the return of the complainant;

(8) On 7 May 2008 was the fifth and final date for hearing. Learned DPP indicated that complainant was still not in court but the prosecution do have other witnesses. Learned counsel for the accused applied for DNNA under s 173(g) of the CPC, and proceeded to make submissions in support of the application. Learned DPP requested for permission to reply on the following day and was allowed to do so, by the court;

(9) On 8 May 2008 the learned DPP replied to the submissions of the learned counsel and indicated in no uncertain terms that he wanted to and can proceed with the case. The learned DPP further indicated that the prosecution would apply for adjournment to call the complainant once witnesses available have testified.

[5] The learned judge then granted the application of the accused and was given the DNNA order. The learned judge in giving the DNAA order stated her grounds as follows:

Mahkamah:

(1) It would be an exercise in futility to examine witnesses present in the absence of complainant.

(2) DPP has conceded whereabouts of complainant not known —

(i) Has never appeared in court even once to demonstrate that she is interested in coming to court — numerous adjournments have been granted at the request of the prosecution to secure her attendance;

(ii) Final adjournment was granted. DNAA.

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SECTION 173(g) OF THE CRIMINAL PROCEDURE CODE

[6] Section 173(g) of the CPC in itself, must be read with s 173(f) as it made special reference to that particular sub-section. It is noted that s 173 of the Code is prefixed by the sentence: 'The following procedure *shall be observed* by magistrates in summary trials'. It is an imperative procedural guide in summary trials, that gives no room for discretion beyond the ambit of that section. Section 173(f) and 173(g) of the CPC reads as follows:

173 Procedure in summary trials

The following procedure shall be observed by Magistrates in summary trials:

(a) ...;

(b) ...;

(c) ...;

(d) ...;

(e) ...;

(f) ...;

(i) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(ii) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(g) Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused *at any previous stage of the case* if for reasons to be recorded by the Court considers the charge to be groundless.

[7] The wordings 'at any previous stage of the case' in sub-s (g) must be read in the light of sub-s (f); which means that it is a stage after the prosecution has proceeded with its case but before the conclusion of the prosecutions' case. It is very different from the wordings 'at any stage of any trial' as can be found in s 254 of the CPC.

[8] To my mind, before the court can invoke s 173(g) of the Code, the court must at least allow the prosecution to proceed with its case. By doing so, then only the court can evaluate the evidence and its circumstances for the court to consider and conclude that the charge to be groundless.

APPLYING THE LAW TO THE FACTS AS TRANSPIRED IN THE RECORD OF PROCEEDINGS

[9] From the record of proceedings it is clear that there is no indication to show that the prosecution has no desire to prosecute, but on the contrary there is clear indication that the prosecution desired to call the other available witnesses first, in order to proceed with its case.

[10] From the records, the prosecution was not given the opportunity to proceed with its case. It has not proceeded to the initial stage of the case; not even the calling of the first prosecution witness. Without hearing even a portion of the prosecution's case how can the trial judge possibly consider and conclude that the charge to be groundless? To do so would tantamount to the trial judge stepping into the shoes of the public prosecutor. Such involvement by the court in the prosecution process is liable to compromise and to be perceived to compromise its impartiality. On this point, it is appropriate to quote what Lord Dilhorne said in *R v Humphries* [1997] AC 1 (at p 26):

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

[11] On the issue of the complainant in the case being absent, it is noted that from the records, the complainant was not available because she was hospitalised and subsequently she went back to Japan for further medical treatment. These are valid reasons and it is unjustified for the trial judge to conclude that the complainant was not interested in coming to court. And even if, after the calling of other witnesses for the prosecution, she is still unavailable, the prosecution do still have the option to tender her statement to the police, as part of the prosecution's case under the provisions of s 32(1)(i) of the Evidence Act 1950. After all there are so many ways to skin

on cat. The prosecution should be allowed to proceed with its case, with their sole discretion as to how to prove their case. For the trial judge to conclude that to allow the prosecution to proceed with its case, in the circumstances, to be an exercise in futility is pre-mature and inappropriate. The court cannot and should not pre-empt the manner the prosecution intended to proceed with its case.

CASE LAW

[12] The issue on the true construction of s 173(g) of the CPC has actually been dealt with in a reference to the Federal Court in the case of *Chu Chee Peng v Public Prosecutor* [1973] 2 MLJ 35 (at p 36) which stated that:

> Thus, when the whole of s 173 is viewed in logical order, it will be seen that paragraph (g) has a good *raison d'etre* for its interposition between paragraph (f) and (h) *et seq*. It is to be remembered that the procedure in s 173 is for *summary* trials. There are constantly cases coming up in subordinate courts where the very corner-stone in the prosecution case collapses at an early stage for a variety of reasons. In that event, should the magistrate continue in the profitless labour *of hearing the rest* of the prosecution to the bitter end, whilst realising that at the dose of the prosecution he would surely have to pronounce a verdict of acquittal? Without the express powers given him by paragraph (g) the futile exercise is inevitable.

[13] The part of the judgment which reads '... *in the profitless labour of hearing the rest of the prosecution* ...' clearly fortified the view that the court ought to hear the initial part of the prosecution's cases before considering invoking the provisions in s 173(g) of the CPC.

[14] The situation would have been different if the prosecution was not ready to proceed with its case because the investigations had not been completed. In such a situation it would be clear that the prosecution had no grounds to prefer a charge and the charge is therefore groundless. This was the rationale in the case of *Public Prosecutor v Tan Kim San* [1980] 2 MLJ 98.

[15] In the case of *Public Prosecutor v Au Seh Chun* [1998] 6 MLJ 179, Justice Suriyadi (now judge of the Court of Appeal) made the following observations:

> I am quite satisfied that under s 173(g) a discharge not amounting to an acquittal may be pronounced where the charge appears to be so groundless ab initio, or can be found to have no good grounds. In fact even *after some witnesses have been examined* and it would appear that the examination of the remaining witnesses for the prosecution will not materially assist the prosecution, the judge may discharge the accused not amounting to an acquittal. It would follow therefore that, when a

charge is groundless ab initio, it must mean that the basis is clearly insufficient to meet the minimum requirement of the accusation.

After perusing this provision of s 173(g), I have to conclude that if the issue of the charge is not being put to the test, then there is therefore no necessity for the magistrate's mind to be directed to it. What is meant here is a scenario where the prosecution, who is interested in pursuing the matter and indisputably has completed the investigation, whishes a postponement on some good grounds. In that situation, the charge is not in issue or being subject to some test of whether it is groundless or otherwise, but merely a rider to the postponement application. Under s 114 in particular illustration (3) of the Evidence Act 1950, the court may presume the existence of any fact which it thinks likely to happen, regard being had to public business that the act performed, in this case an official act, had been regularly performed. Therefore *at that stage it must be deemed that the Public Prosecutor had sufficient evidence to proceed with the case* as otherwise he would not have charged the accused.

[Emphasis added.]

[16] In another case, *Public Prosecutor v Mat Radi* [1982] 1 MLJ 221 where the lower court discharged the accused because the DPP did not appear to prosecute the case, the High Court, on appeal, held that such a reason does not make the charge to be groundless. The case also confirmed the view that s 173(g) of the CPC should be read in conjunction with s 173(f) of that code.

[17] Lastly, in the case of *Karpal Singh v Public Prosecutor* [1991] 2 MLJ 244 (at p 248) the Supreme Court held that:

The following para (g) is the crucial one for discussion in this case. The court may discharge the accused (not acquit) if the court considers the charge to be groundless. The magistrate will have to record the reasons for his decision. If he discharges the accused, there is nothing to prevent the prosecution re-charging the accused. The reason for the discharge may be that the magistrate finds he has no jurisdiction or the charge does not disclose any offence known to the Penal Code or other written law.

CONCLUSION

[18] Based on the interpretation of s 173(g) of the CPC and guided by the above-cited case law, I conclude that the DNAA order given by the trial judge was contrary to the spirit and intention of the said section. It is my finding that in the circumstances of the case there is no legal basis to hold that the charge is groundless.

[19] Of late, I also take judicial notice that there is too many cases in the lower courts in Kuala Lumpur where orders of DNAA were given. Here, a

reminder as stated in the case of *Public Prosecutor v Hettiarachigae LS Perera* [1977] 1 MLJ 12 at p 14, which said:

> I would like advise magistrates to cease forthwith the practice of discharging not amounting to an acquittal a case when the police are not ready to proceed. This is only sweeping the dirt under the carpet to produce neat monthly returns. The police will only institute fresh proceedings as happened in this case and unnecessary paper work and inconvenience is caused. If the police are not ready, the magistrate should adjourn to another date. Even if it takes ten years to dispose a case that is better than pretending to dispose of it early by means not provided by law. So let it be. One of the virtues of the judiciary is patience. If the waiting should become unbearable the remedy lies elsewhere.

Is still relevant and appropriate to this day. The same judge, Justice Harun also cautioned against discharging of cases due to absent of witnesses, in the case of *Public Prosecutor v Karumah* [1980] 2 MLJ 102, in the following words:

> Apart from avoiding repetitive prosecutions as happened in *Perera*'s case, courts would also bear in mind that discharging cases because of absent witnesses could easily encourage the criminal world to spirit way prosecution witnesses to frustrate trials. Should this happen then the administration of justice will be a mockery. The police on the other hand should look out for such eventualities and prevent their occurrence.

[20] A similar caution was also echoed by the Supreme Court case of *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100 (at p 103) which stated that:

> A word of caution should be expressed here. Magistrates must appreciate that the refusal to postpone trials must inevitably result in the discharge of the accused and this power should therefore be used sparingly as a last resort only. It should not be ordered as an expression of anger and exasperation at or as a censure against the conduct of the prosecution. Failure to exercise this power judicially will lead to injustice and inconvenience to the accused — the very purpose for which power is exercisable.

[21] In the light of the above, the court, in the administration of criminal justice, must weigh the balance of justice when it comes to a situation between the interest of the accused versus the interest of the prosecution which represent the public and the state.

[22] In the circumstances and the facts of the case, I conclude that the DNAA order given by the session court judge was not given in accordance to the substantive procedural law governing summary trials.

[23] In exercise of my revisionary powers under s 325(1) of the CPC, I therefore set-aside the said DNAA order and accordingly further ordered that the case to be remitted back to the session court for trial based on the original charge and case.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed